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Nos. 95-966 and 95-977

In The

Supreme Court of the United States

October Term, 1995

KEVIN M. O'GILVIE and STEPHANIE L. O'GILVIE,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

KELLY M. O'GILVIE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

REPLY BRIEF FOR THE PETITIONER KELLY M. O'GILVIE

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I. CONSTRUCTION AND INTERPRETATION OF I.R.C. §104(a)(2)

A. INTRODUCTION

The Brief for the United States gives no assistance in resolving the questions of interpretation before this Court. The discussion of ambiguity is conspicuous by its absence. The IRS notes but makes no argument and gives no authority for the application of a "default rule" before the determination of ambiguity or before the interpretation of intrinsic evidence. Neither does the IRS support or argue for the demotion of its own Treasury Regulation to a mere additional regulatory requirement as this Court found necessary in *Schleier*. The IRS argues only the outcome of the cases in *CIR v. Schleier,* 515 U.S. ___, 115 S.Ct. 2159, 95-1 USTC ¶ 50,309 (1995); *Commissioner v. Miller,* 914 F.2d 586 (4th Cir. 1990), 90-2 USTC ¶ 85,713 (1990); *Hawkins v. United States,* 30 F.3d 1077 (9th Cir. 1994), cert. denied, 115 S.Ct. 2576 (1995); *Reese v. United States,* 24 F.3d 228 (Fed. Cir. 1994), 94-1 USTC ¶ 50,232 (Fed. Claims 1994); *Wesson v. United States,* 48 F.3d 894 (5th Cir. 1995), 94-1 USTC ¶ 50,130, reh'g denied, 1995 U.S. App. LEXIS 12,574; and *O'Gilvie v. United States,* 66 F.3d 1550 (10th Cir. 1995), 95-2 USTC ¶ 50,508; and does not address the issues that bring this case before this Court; namely, the inconsistent underlying methods by which each of these courts reached their decisions.

The IRS expresses no philosophical or legal discomfort in relying on the decision of this Court in *Schleier* with its underlying premise that the statute is *plain* while arguing simultaneously that the statute "is not free of ambiguity" in order to invoke a "default rule." (Brief for United States at page 16.) If the statute is *plain,* as this Court found in *Schleier,* then no further interpretation, including application of a "default rule," is necessary. If the statute is *ambiguous,* as this Court found in *Burke v.*

United States, 504 U.S. 229, 112 S.Ct. 1867, 92-1 USTC ¶ 50,254 (1992), 112 S.Ct. 1867, then the mandate to strictly construe exclusions in favor of the government requires that the court determine whether there is a "clear Congressional intent to exclude." An automatic "default" finding in favor of the government upon a determination of ambiguity is error. This error is the fundamental flaw of the recent decisions of the appellate courts. (*O'Gilvie, Hawkins, Reese, Wesson,* and *Miller*.) Strict interpretation of an ambiguous exclusion to tax requires interpretation of relevant extrinsic evidence to discern whether there is a "clear Congressional intent to exclude."

B. RATIONALE v. INTENT

1. At pages 18 and 19 of the Brief for the United States, the confusion between the RATIONALE behind the statute and the INTENT of the meaning of the words continues. Perhaps the IRS is unaware of the distinction or perhaps such confusion serves the purposes of the IRS. In any event, there is a clear and critical distinction between rationale and intent in the area of statutory interpretation.

Evidence of rationale, that is, the underlying reason or reasons the Enactors wrote the words, can be admitted as evidence only if the statute is ambiguous and then for only one purpose and no other. That solitary purpose is to give evidence of what the writers of the words meant the words to say at the time the words were written and under the circumstances at the time. *Heydon's Case*, 3 Co. Rep. 72, 76 Eng. Repr. 637 (1584); *Youakim v. Miller*, 562 F.2d 483 (7th Cir. 1977); *Potomac Elec. Power Co. v. Director, Office of Workers' Comp. Programs, U.S. Dept. of Labor*, 606 F.2d 1324 (DC Cir. 1979). All other uses of evidence of rationale are improper.

2. The IRS and a number of courts reason that the Enactors wrote the words because the Enactors believed the amounts were not taxable because they were not income. *Miller v. Commissioner*, 93 TC 330 (1989); *Miller*, 914 F.2d 586; *O'Gilvie*, 66 F.3d 1550; and *Downey v. Commissioner*, 97 TC 150 (1991). (See also *Eisner v. Macomber*, 252 U.S. 189.) That belief is properly termed a RATIONALE. Assume for this discussion that the original INTENT of the Enactors in writing this statute was to exclude those amounts the Enactors believed were not income in response to that RATIONALE as the IRS argues. The words the Enactors wrote effectively excluded those amounts, "the amount of any damages received," from tax at that time. The words the Enactors wrote expressly *exclude*, but do not express, in words, any rationale for excluding. Review of the RATIONALE to determine what the words meant at the time written *is* a proper use of the evidence of rationale *if* the statute is ambiguous.

Later courts determined that there was a flaw in the alleged RATIONALE of the Enactors. The IRS cites 1956 as the year and *Commissioner v. Glenshaw Glass*, 348 U.S. 426, 75 S.Ct. 473, 211 F.2d 928 (1955), reh'g denied, 349 U.S. 925 (1955) as the case that shows this flaw. Because "lost wages," "profits," and "punitive damages" when received in a personal injury suit were then included in the definition of gross income, the IRS tried to substitute the underlying RATIONALE for what the Enactors INTENDED the words to say at the time written. The IRS' argument, stripped bare, says, in effect, if the Enactors knew what we know now, they would never have written these words. Or more insidiously, that because the IRS believes that the Enactors' underlying rationale was based on a legal fact shown to be incorrect in 1956, the

meaning of the words changed. The RATIONALE of the Enactors' did not change, and neither did the words.

Even if the surmise of the IRS were correct that the controlling rationale was based on a now incorrect legal fact, then evidence of that rationale is permitted for only one purpose and no other, to show the INTENT of the words of the statute. The confusion and the misuse of evidence of rationale occurs when the IRS forwards the rationale as the equivalent of Congressional intent.

3. The IRS' discussion of intent and rationale ignores the very strong probability that the Enactors well knew of the controversy of whether lost wages, profits and punitive damages were taxable, as is evidenced by the actual text of the statute itself. (See discussion about prior tax codes and Sixteenth Amendment in 95-977 Pet. Br. – Kelly M. O'Gilvie, page 26.) If the Enactors had had no doubt that the amounts were not income, they would have had no need to write an unnecessary statute. The existence of the statute gives evidence that the Enactors, or at least some of them, believed recovery of lost wages, lost profits and punitive damages were otherwise taxable. The very words of the House Committee on Ways and Means, H.R. Rep. No. 767 at 9-10 (1918), (herein Committee Report) (For text see 95-977 Pet. Brief – Kelly M. O'Gilvie, at page 25,) relied upon by the IRS, written at a time when revenue laws were actually written by the Congress and not an administrative agency, indicate that there is a *controversy* about *whether* such damage awards were income. *Miller*, (TC); *Miller*, (4th Cir.); *Downey*, (TC); *O'Gilvie*, (10th Cir.). (See also *Eisner v. Macomber*, 252 U.S. 189 (1918).)

The Enactors resolved that controversy by an affirmative act. They wrote and made into law §213(b)(6) which carried out a Congressional social policy of tax relief for the injured and bereaved. (See discussion in

95-977 Pet. Br. – Kelly M. O'Gilvie, page 25.) The evidence of the awareness of Congress of the controversy of whether or not the amounts were otherwise taxable is so strong in the Committee Report and the very act of writing the statute itself, that the weaker implications and surmises that Congress had other purposes and rationales cannot control the interpretation. *Skelly Oil Co. v. U.S.*, 255 F.Supp. 288 (ND Okla. 1966).

4. Although there is no support in the text of the statute or in the Committee Report, the IRS forwards a third rationale, intertwined with the first, as the "underlying purpose" of the statute. This third rationale is a "return of capital," "underlying compensatory purpose," or now "conversion of capital" rationale. (Brief for the United States, 18-19.) The IRS reads into a 1920 IRS decision the words "return of capital" that are not present. And the IRS' reliance on *Doyle v. Mitchell Bros.* is incomprehensible. That case involves the question of whether a gain on sale of stumpage, purchased before the 1918 tax law was enacted but sold after the law passed, was gross income. *Doyle v. Mitchell Bros.*, 247 U.S. 179 (1918). The question answered by that court and by the Attorney General's opinion cited in conjunction was whether amounts were includable in gross income because they were a return of capital. No exclusion was at issue in those opinions.

The most authoritative extrinsic evidence, besides the statute itself, is the House Committee on Ways and Means Report, in which Congress explained the rationale behind the exclusion. That Committee Report contains no mention or reference to a "return of capital" rationale, instead the Committee Report expresses only the doubt that such amounts would be required to be included in income.

A rationale is competent evidence only of the intent of the original Enactors at the time the statute was written and then, only if the statute is ambiguous. There is strong evidence that the "not otherwise taxable" rationale and the tax relief for the injured and bereaved rationale are primary. There is no direct evidence of the IRS' suggestion of a return of capital rationale. The IRS here seeks to substitute one rationale – return of capital – for the intended meaning of the words. Such a use of rationale is impermissible.

5. The "return of capital" theory has been rejected repeatedly as the underlying rationale in §104(a)(2). (See discussion in *Petition for Certiorari* – *Kelly M. O'Gilvie*, pages 22-24, and page 23, footnote 2.) Inquiry into the nature of the underlying claim is not unique. See *Tygart Valley Glass Co.*, 16 TC 941 (1951); *Spangler v. Comm.*, 323 F.2d 913 (9th Cir. 1963); *Carter's Estate v. Comm.*, 298 F.2d 192 (8th Cir. 1962); *Sanders v. Comm.*, 225 F.2d 629 (10th Cir. 1925). The source of the underlying claim has long been the approved test.

6. The mere fact that the IRS relies on *Glenshaw Glass* as authority for a change in the interpretation of §104(a)(2) shows conclusively it was the belief that these amounts were *not includable in income* that was overcome in that case. Punitive damages were never believed to be a *return of capital*, the matter was never litigated and *Glenshaw Glass* had nothing to do with confirming that punitive damages were not a return of capital.

7. There is no showing that the Enactors did not understand that damages, including lost wages, profits and punitive damages might otherwise be taxable. The tax code of the time included in gross income, income "from whatever source derived." (See discussion in 95-977 Pet. Br. – Kelly M. O'Gilvie, page 26.) *Glenshaw Glass* did not repeal the current law, but only affirmed the

broad sweep of the statutory language that was in effect in 1918. (See discussion in 95-977 Pet. Br. – Kelly M. O'Gilvie, pages 30-32.)

8. The diverse rationales of a Congress of many diverse representatives who participate in drafting and enacting a statute cannot ever be known and estimations of those rationales are merely an aid to interpretation of INTENT at the time of enactment. The very existence of the statute is evidence that those Congressmen believed that there was a need for exclusion from tax of amounts that might otherwise be taxable. The act of excluding *any income* from tax gives tax relief to some taxpayers. The rationale of providing tax relief for the injured and bereaved is manifest in the statute itself. (See Holmes, Collected Legal Papers, p. 207 (New York 1920)).

C. DEFAULT RULE

1. Rigorous inquiry into the "intent of Congress" assures the full expression of the purposes of our government's legislative branch and full enforcement of that expression. Premature application of a "default rule" in favor of the government is a suppression of that Congressional intent. The Tenth Circuit found that the statute, §104(a)(2), is susceptible to two meanings and therefore must succumb to the "default rule." The "principle of narrow construction" is not a "default rule" that relieves the court from comprehensive review of extrinsic evidence. The "principle of narrow construction" requires that the intent be discerned from the careful analysis of *all* extrinsic evidence and that a clear Congressional intent to *exclude* is evidenced.

2. An ambiguous statute *does not* trigger a "default rule" in favor of the government. The words "any damages . . . received on account of personal injuries," can express that clear intent, whether by plain meaning *or*

from interpretation of extrinsic evidence. *Crane v. Commissioner*, 331 U.S. 1 (1947). The inevitable consequence of such a premature application of a "default rule" is the denial of the full expression and enforcement of the intent of Congress. (See full discussion in 95-977 Pet. Br. – Kelly M. O'Gilvie, pages 8-15.)

D. GLENSHAW GLASS

1. At page 20 of the Brief for the United States, the IRS boldly states that, "This court reviewed much of *this same legislative and administrative history* in *Commissioner v. Glenshaw Glass*." The *same* legislative and administrative history to which the IRS refers is totally irrelevant to the decision of this court in *Glenshaw Glass*. The IRS obviously attempts to bolster the significance of footnote 8 in *Glenshaw Glass* upon which it relies.

The question in *Glenshaw Glass* was whether the definition of gross income was broad enough to encompass punitive damages. This Court determined that the definition of "any income derived from any source whatsoever" (basically unchanged since 1913, Tax law of 1913, Section B, lines 1-19) was broad enough to encompass even punitive damages. (See discussion in 95-977 Pet. Br. – Kelly M. O'Gilvie, page 26.) The legislative and administrative history of the §104(a)(2) exclusion had no precedential or persuasive authority in the decision that this Court reached in *Glenshaw Glass*.

2. In its brief the IRS relies on footnote 8 in *Glenshaw Glass* for the proposition that "[d]amages for personal injury are by definition compensatory only." In the facts of *Glenshaw Glass*, there was no award for personal injury and no exclusion before the Court. In addition, this statement is directly contrary to the

comprehensive list of damages, including lost wages and punitive damages, which characterize a personal injury tort claim. *Burke*, 112 S.Ct. at 1870-1872.

ERRATTA. Petitioner's brief states that in *Glenshaw Glass*, the Court makes the statement that "unless otherwise excluded, punitive damages are taxable." This is incorrect. Petitioner's counsel apologizes to the opposing counsel and to this Court. The phrase "except as otherwise provided" is actually found at I.R.C. §61(a).

3. If footnote 8 in *Glenshaw Glass* is examined closely, it is evident that the writer based his statements upon an incorrect assumption. That incorrect assumption is that punitive damages were excluded under §104(a)(2) *because* punitive damages were believed to be a **return of capital**. The legislative history of §213(b)(6), and §104(a)(2), and the decisions of the courts which have addressed this issue, (*O'Gilvie* (10th), *Miller* (4th), and *Downey* (TC)), have affirmed that punitive damages were believed NOT TO BE INCOME. There has never been a considered opinion that suggested that punitive damages were believed to be a return of capital.

In footnote 8, this Court in *Glenshaw Glass* did acknowledge that punitive damages are excluded under §104(a)(2). The logical inference that may be drawn from the fact that punitive damages were excluded and they are *not* a return of capital is that the theory or rationale of *return of capital* cannot be the sole rationale for the exclusion.

E. STARRELS

The Ninth Circuit in *Starrels v. C.I.R.*, 304 F.2d 574 (1962), finds that the §104(a)(2) " . . . exemption is allowed for damages which have already occurred. There is no suggestion of any exception for amounts paid for possible future damages." *Starrels* at 576. The "injury" for

which she had been paid had not yet occurred to Mrs. Starrels. The issue of punitive damages was not before the court in *Starrels*. The comments about making the taxpayer whole from a previous loss of personal rights goes to the threshold finding that there was no tort, and therefore nothing to recompense. The discussion about restoration of capital is not made with punitive damages at issue and is therefore *dicta* with reference to punitive damages.

F. TITLE

1. As a matter of sound policy, I.R.C. §7806(b) applies to Title 26, the Internal Revenue Code, a part of the Federal Code that has been built piecemeal over nearly a century. The various square peg tax provisions enacted yearly since 1913 have been tucked into whatever round hole they can best be made to fit. For example, here the relationship between the *type of claim* (personal tort claim) that would generate **both** *compensation* from insurance, workman compensation, and a *damage award* in litigation or settlement of litigation was the connecting point for the original §213(b)(6), which then became §104(a)(1), §104(a)(2), and §104(a)(3). (See discussion concerning "personal injury and sickness" as the object of two prepositional phrases at page 16 herein.) The *type of damage awarded* (compensatory) was not the connecting point for organization of this statute which had now been cut into parts.

2. As pointed out in 95-966 Brief of Petitioners Stephanie O'Gilvie and Kevin O'Gilvie, at pages 16-18, and acknowledged by the IRS at page 19 of the Brief for the United States, the title of §104, "Compensation for injuries or sickness" was not contained in the original enactment of the statute as §213(b)(6) of the Revenue Act of 1918. *That title* has no relevance or interpretive value in

the determination of the original meaning intended by the Enactors in the words they wrote in 1918.

3. That title was given to the section in 1939. IRS seeks to have significance assigned to the title by the reenactments of Congress. IRS' argument is incomplete, for along with that title, Congress reenacted the administrative and caselaw interpretation of the section as *excluding lost wages, lost profits and punitive damages*. (See *Petition for Certiorari – Kelly M. O'Gilvie* pages 17-24.)

4. The IRS' description of the authority upon which it relies for the proposition that "the title of a statute or section can aid in resolving ambiguity in the legislation's text" is misleading and unpersuasive here. The case of *INS v. National Center for Immigrants' Rights, Inc.*, 502 U.S. 183 (1991) involves the interpretation of federal statute, Title 8, which was written as a unified whole, enacted at one time, and in which the title and organization were part of the original enactment. Also very importantly, interpretation of the provisions of Title 8 of the federal code by reference to "location or grouping" is *not prohibited by statute*. In contrast, 26 U.S.C. §7806(b) expressly prohibits such interpretation of the "contents of this title (Title 26.)" The interpretation of the provision in Title 8 by this court in *INS, supra*, was not under any similar statutory prohibition.

5. Likewise, the reference to the case of *Maguire v. Commissioner*, 313 U.S. 1, is misleading and unpersuasive. The IRS flatly states that the case stands for the proposition that *administrative title is determinative of meaning*.

> That *same conclusion* has been reached by this court in cases arising under the internal revenue laws. *Maguire v. Commissioner*, 313 U.S. 1, 9 (1941) ("the title of an act***may be of aid in resolving an ambiguity") (Brief for the United States, page 21, footnote 6.) (Emphasis added.)

In *Maguire*, this Court did not interpret the meaning of a statute from an administrative label or title as *INS v. National Center for Immigrants' Rights, supra*, case, or as the Court is asked to do here, but instead it considered the title of an ACT OF CONGRESS. The title of that act was given by the enacting Congress as part of the drafting and legislative process. The title of a House or Senate Bill that is enacted as law is not the equivalent of a label or title given by the administrative agency years after enactment. It can reasonably be said that the title of the ACT OF CONGRESS given by the Enactors is evidence of the intent of those Enactors. It is, however, significant to note that in *Maguire*, this Court expressed that the interpretive value of a title is limited even when that title is bestowed by the enacting Congress. *Maguire*, 313 U.S. 1, 9.

6. As a matter of common sense and sound statutory construction, the title given to a section for administrative purposes 21 years after enactment cannot be found relevant to the interpretation of the intent of the original Enactors. If the reenactment of the title of the section without change is to be given any weight, then the identical reenactments of the section interpreted as excluding lost wages, lost profits and punitive damages must be given the same weight. (See detailed discussion in *Petition for Certiorari – Kelly M. O'Gilvie* at pages 17-24.)

The groupings, arrangements, administrative titles, and other methods used by the administrative agency to organize the unwieldy body of law that has developed in a piecemeal fashion over decades cannot then be used by that same administrative agency as *primary evidence* of its position in litigation. The theory is that Congress will make the laws and the IRS will, in turn, enforce them.

G. AMBIGUITY

1. Beginning at page 23, item 3, sections (a) and (b) of the Brief for the United States, the IRS details an argument about the meaning of the separated words and phrases in the statute. This piecemeal argument misses the mark. The ambiguity in §104(a)(2) is not in the meaning of the disjuncted words "any damages" and "on account of personal injuries or sickness," as the IRS' argument suggests. The ambiguity in §104(a)(2) is a patent structural ambiguity. The entire sentence can be read to mean two different things. (See detailed discussion in 95-977 Pet. Br. – Kelly M. O'Gilvie, pages 16-19.) Both meanings are equally "clear," but the sentence cannot mean both things at the same time.

2. Those two distinct meanings have been fully articulated. The first in time, was expressed in the original statute, and in the Treasury Regulation 1.104-1(c), by the IRS in Rev. Rul. 75-45, by the Sixth Circuit in *Threlkeld v. C.I.R.*, 848 F.2d 81 (6th Cir. 1988) and *Horton*, the Sixth Circuit and this Court in *Burke*, as well as by numerous lower courts. *Pistillo*, 912 F.2d 145 (6th Cir. 1990); *Burke*, 929 F.2d 1119 (6th Cir. 1991); *O'Gilvie*, 92-2 USTC ¶50,567 (D. Kan. 1992); *Hawkins*, 93-1 USTC ¶50,208 (D. Ariz. 1993); *Horton*, 100 TC 93 (1993); *McKay*, 102 TC 465 (1994); *Bennett*, 30 Fed. Cl. 396 (1994); *Miller*, 93 TC 330 (1989); *Threlkeld*, 87 TC 1294 (1986); *Metzger*, 88 TC 834 (1988); *Downey*, 97 TC 150 (1991). See also *Hawkins*, 30 F.3d at 1085, dissent of Judge Trott.

This first interpretation requires that the language "any damages received . . . on account of personal injury," limit the exclusion to damages where the ***type of claim*** from which the award is made is personal injury and "that is the beginning and the end of the inquiry." *Burke*, 112 S.Ct. at 1869.

The second meaning was first articulated by the IRS with regard to punitive damages in the Rev. Rul. 84-108, and followed by the Fourth Circuit in *Miller* and its progeny. That interpretation is that the words of §104(a)(2) require that the ***type of damages*** excluded be limited to only those damages awarded for compensation for, or as a return of capital for personal injury.

The interpretation that the language of the provision requires that the ***type of damages*** be limited to only those damages awarded as a return of capital for personal injury (in the context of §104(a)(2)) was first promoted by the IRS with regard to lost wages and profits in 1972. The IRS argued that because the taxpayer was made more than whole, that is the wages or profits were not a return of capital and would have been taxable had the taxpayer received them in employment, then the requirement to be "on account of personal injury" was not met. This argument was repeatedly rejected and those holding approved by this Court. *Burke*, 112 S.Ct. 1871. (See *Petition for Certiorari – Kelly M. O'Gilvie* at pages 22-24.)

3. The test for ambiguity is surely met when reasonable persons, including at least five panels of Federal Judges, Supreme Court Justices, numerous panels of lower courts Judges, and members of Congress in their legislative role (1989 Amendment) differ as to the interpretation of the provision.

4. The courts have been little aided by counsel in putting this ambiguity into perspective. There has been no clear articulation of the exact nature of the ambiguity in the briefs filed or the cases decided until this time. The IRS and even counsel for the Petitioners in the consolidated case here argue the disjuncted pieces of the statute.

Petitioner most respectfully asserts that this Court is incorrect in its finding in *Schleier* that §104(a)(2) is plain and unambiguous. Petitioner asks that the finding made

by this Court in *Burke* that the statute is ambiguous be reaffirmed.

H. INTERPRETATION

1. Plain words of original statute.

The Petitioner agrees with the IRS' statement that proper construction of a statute requires reading the statute as a whole and not piecemeal. *Crane v. Commissioner*, 331 U.S. 1 (1947). The original whole is §213(b)(6). (Revenue Act of 1918, ch.18, §213(b)(6), 40 Stat. 1066 (1919).)

> ***Amounts received*** through accident or health insurance or under workmen's compensation acts, ***as compensation for personal injuries or sickness***, plus ***the amount of any damages received*** whether by suit or agreement ***on account of such injuries***.

The subject of the first clause is the phrase "amounts received as compensation" and the subject of the second clause is the phrase "the amount of any damages." Nothing in the written text of the section requires the "amount of any damages" in the second clause to be "compensation." Despite the IRS' many unsupported protestations to the contrary, the language of the original statute clearly and unmistakably distinguishes between "*amounts received as compensation*" for personal injury or sickness and "*the amount of any damages received*" for such injuries.

The IRS' discussion about the original statute in its brief at pages 27 and 28, does not draw the reader's attention to any *reasons* that the word "compensation" in the first clause might limit or modify the word's "amount of any damages" in the second. The IRS merely states that the "Petitioners seek to tear asunder words that the statute has joined together," and repeats its own conclusion several times. The IRS' unsupported and conclusory assertions do not change the text of the provision.

The two independent clauses of the original statute have two distinct subject clauses: the first, "amounts received as compensation" and the second, "the amount of any damages." These two independent clauses have only the *object of a prepositional phrase* in common; "for **personal injuries or sickness**" in the first clause and "on account of **such injuries**" in the second. There is no conceivable reading of the statute that would permit the word "compensation" to modify any part of the second clause. The word "compensation" is inextricably bound to the words which precede it and is unavailable to modify the words which follow.

2. Treasury Regulation.

The IRS had no authority to issue quasi-legislative Regulations for §213(b)(6) (1918) or any of its successors and none has been cited. Treasury Regulation §1.104-1(c) was issued only to *interpret the statute* for taxpayers and IRS staff. Without special authority to issue a quasi-legislative Regulation, the Regulation has no authority as an "additional administrative requirement;" as was found in the *Schleier* decision. The IRS has not amended nor repealed the extant Treasury Regulation.

3. 1989 Amendment.

a. The IRS' argument in its Brief at footnote 8, page 26, that ". . . they are the 'masters of the subject' " and that rules should be written by them is troubling at best but does reflect the view taken by the IRS of its role as lawmaker. The IRS here has failed to distinguish between rules necessary to interpret and enforce Congress-made laws and the authority of the IRS to make the law. The IRS asks deference to its Revenue Rule as law instead of seeking interpretation of the Congress-made law. (Brief for United States page 26.) This is improper. The IRS

litigation position has little interpretive value and is certainly not law. This statute must be interpreted with a firm eye on the intent of the enacting Congress and reenacting and amending Congresses as the law makers.

b. At a minimum, the 1989 Amendment to §104(a)(2) shows that the members of Congress who enacted the Amendment, and who may be presumed to be reasonable persons, believed that the statute excludes punitive damages. This supports the view that the statute is ambiguous in its current form.

c. At page 29 of its brief, the IRS asserts that this Court has long rejected the argument that an amendment to the tax laws provides evidence that the law was formerly otherwise. *Higgins v. Smith*, 308 U.S. 479, 480. The IRS is mistaken and the *Higgins* case is inapplicable here. In *Higgins*, the old law had been changed and the new provision was unambiguous. Here, the law is unchanged and it is the meaning of an ambiguous statute that is sought.

> The general rule is perfectly well settled that, where a statute is of doubtful meaning and susceptible upon its face of two constructions, the court may look into prior and contemporaneous acts, the reasons which induced the act in question, the mischiefs intended to be remedied, the extraneous circumstances, and the purpose intended to be accomplished by it, to determine its proper construction. But where the act is clear upon its face, and when standing alone it is fairly susceptible of but one construction, that construction must be given to it.

Hamilton v. Rathbone, 175 U.S. 219, 221. See also *U.S. v. Bowen*, 100 U.S. 508. There has been no argument made here that the substantive law has been changed.

> The whole doctrine applicable to the subject may be summed up in the single observation

that prior acts may be resorted to, to *solve*, but not to *create*, an ambiguity. *Hamilton* at 222.

d. The use of the later enactments to clarify previous law is *not* prohibited as the IRS asserts. This use of later enactments has been approved and demonstrated in the case of *Hamilton v. Rathbone*, 175 U.S. at 421 to 423; *United States v. Community TV, Inc.*, 327 F.2d 797 (10th Cir. 1964); and this Court in *Burke*, 112 S.Ct. 1871, fn. 6, and 1876, fn. 3, to clarify an ambiguous statute. (See detailed discussion in 95-977 Pet. Br. – Kelly M. O'Gilvie, page 39.)

e. The admonition that "the view of a subsequent Congress forms a hazardous basis for inferring the intent of an earlier one" is apt. However, that admonition goes only to the use of the views of later Congresses for inference of intent of the enacting Congress and does not prohibit review of the statute for other purposes in appropriate circumstances. The Court is vested with the discretion to determine what extrinsic evidence may be brought to bear on the question of an ambiguous statute and what weight to give that evidence.

There are other factors here that indicate that careful consideration should be given to the 1989 Amendment of this statute as this Court did in *Burke*. The reenactments and amendments of later Congresses with the interpretation of the statute as limiting only the *type of claim* is not an attempt to infer the intent of the Enactors, but are surely relevant to the question of Congressional approval of long standing administrative practice and approval of relevant case law. Perhaps most important, the interest of the public in a consistent and cohesive body of law is great and the power of the Congress to make law is predominant.

I. SUMMARY OF §104(a)(2)

1. Ambiguity requires a choice between two. The choice here is clear. Either the words were originally intended to mean 1) that the *type of claim* is limited to a personal injury claim and any damages that flow from that claim are excluded (Treas. Reg. 1.104-1(c); *Horton*, 33 F.3d 625; *Burke*, 504 U.S. 229; or 2) that the *type of damages* excluded is limited to only those damages received as compensation for personal injury. (*Miller, supra*; and progeny.) Application of both tests at once is untenable. Cf. *Rice v. United States*, 834 F.Supp. 1241 (E.D. Cal. 1993); and *C.I.R. v. Schleier*, 115 S.Ct. 2159.

2. The ambiguous statute must be interpreted from extrinsic evidence to discern the "intent" of the words written and not the possible rationales. If that interpretation evidences a "clear intent to exclude," then the requirement that the exclusion be "narrowly construed" is satisfied. The fisc is properly and adequately protected by the requirement that "clear Congressional intent to exclude" be found. An additional "default" rule is an insurmountable obstacle that suppresses genuine Congressional intent. That clear intent is evident in §104(a)(2) not only in the words of the original Enactors and in the Treasury Regulation but also the reenactments and amendment of the subsequent Congresses with the interpretation *that the relevant inquiry is into the source of the underlying claim* and that is the "beginning and the end of the inquiry." Judicial and administrative legislation to *correct* tax policy denies Congress' authority and power to make law.

II. IMPERMISSIBLE EXPANSION OF JUDICIAL AUTHORITY TO MODIFY JUDGMENTS – F.R.C.P 60(a)

The Petitioner has already thoroughly argued the application of the Federal Rules of Civil Procedure law to show that the IRS did not file its notice of appeal timely. If the Judgment of November 30, 1993, was amended under Rule 60(a) then there was no tolling of the time in which to file the notice of appeal. No motion was made that the Judgment be amended. This is certain. The Judgment was *amended* by the district court. That is certain. There is no other Federal Rule except Rule 60(a) under which the district court had authority to amend a Judgment on its own motion. The district court must have amended its Judgment under some authority outside the Federal Rules of Civil Procedure, or the IRS did not timely file their appeal.

Respectfully submitted,

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